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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL J. LASTER, Defendant and Appellant.	B206489 (Los Angeles County Super. Ct. No. KA075090)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel J. Buckley, Judge. Affirmed as modified.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Michael J. Laster was convicted of driving under the influence (Veh. Code,[1] § 23152, subd. (a)) and sentenced to 25 years to life in prison under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Laster asserts that the trial court erred in admitting evidence; that there was insufficient evidence to support the conviction; that the trial court made two errors in instructing the jury; that his prior convictions should not have been considered strikes; that his prior strikes should have been stricken; and that his custody credits were erroneously calculated. We modify Laster's custody credits but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2005, at approximately 11:00 p.m., California Highway Patrol officers observed Laster traveling at a high rate of speed and weaving through traffic in his car on a freeway. Officer Jason Hughes, driving at approximately 95 miles per hour because he was responding to a collision, observed that Laster was keeping pace with the patrol car. Hughes watched Laster for approximately one-half mile. Laster was weaving from left to right, crossing over the lane lines into another lane and to the shoulder. As Laster approached a slower-moving car ahead of him, instead of slowing down and changing lanes safely, he drove right up to the bumper of the car and abruptly hit the brakes so hard that Hughes could see the front of the vehicle dip downward. Laster then changed lanes without signaling. He repeated this maneuver, approaching another car, braking so hard the car dipped, and changing lanes without signaling, all at a high rate of speed.

Hughes activated his forward-facing emergency lights and his flickering headlights to pull Laster over. Laster neither slowed nor moved to the right. At that point, Hughes employed all of the car's emergency lights and its siren. After a short pause, Laster pulled off the freeway and stopped. When Hughes approached Laster in the

[1] Unless otherwise indicated, all further statutory references are to the Vehicle Code.

car, he observed that Laster's eyes were bloodshot and watery, and he could smell an odor of alcohol emanating from the vehicle. Laster admitted to drinking two glasses of wine.

Hughes ran field sobriety tests on Laster. First, Hughes performed the horizontal nystagmus test, an eye movement test that revealed that Laster's eyes did not track a moving finger smoothly and indicated that he might be intoxicated. On the Romberg test, in which the subject stands with feet together, hands by the sides, and tilts his or her head backward with closed eyes, then estimates the passage of 30 seconds, Laster estimated that 30 seconds had passed in five seconds. The limited ability to estimate time was an indication that there could be alcohol in his system. He also swayed in a circular motion during the test.

Next, Laster was asked to perform a one-leg stand test, in which the subject raises one foot approximately six inches off the ground and balances on the other leg with arms straight by the sides, counting the seconds aloud. Prior to raising his foot off the ground, Laster had to raise his hands approximately 10 inches from his sides just to keep his standing balance. He was swaying. As soon as he lifted his foot in the air, he had to set it down again. He then managed to perform the task, albeit with raised arms; he changed his counting method midway through the test and abandoned the test before being told to stop. Hughes considered Laster's raised arms, dropping of the foot, and failure to follow instructions indications that he could be intoxicated.

Finally, Hughes was asked to perform the finger count test, in which the subject touches the tips of his or her fingers to the tip of his or her thumb, counting as he or she proceeds. Starting with the index finger first, the person is to count aloud 1-2-3-4, then backwards, 4-3-2-1. To complete the test, the subject performs three sets of counting forwards and backwards. Laster miscounted and performed the test six times rather than three times.

Hughes concluded that Laster was impaired, arrested him, and asked him to take a chemical test. Laster agreed to a breath analysis and was taken to a sheriff's substation

for the breath analysis. When Laster was being transported, Officer Scott Clyburn, Hughes's partner, detected "an overwhelming smell of alcohol."

After attempting the breath analysis test, during which the machine twice reported that an insufficient sample was received and then timed out, Hughes advised Laster that he could either take a blood test or be found to have refused a chemical test. Laster agreed to the blood test and was taken to a hospital. In the 20 minutes that they waited for a nurse, Laster provided information to Hughes for the booking form for approximately five to 10 minutes. When the nurse arrived, Laster appeared to be sleeping. The nurse attempted to wake him to obtain his consent to the blood draw, but he would not answer. He opened his eyes and then acted as if he was asleep. The nurse remained there for several minutes, but Laster did not respond to her questions. It did not appear to Hughes that Laster was actually sleeping, because each time he tried to get Laster's attention, Laster immediately opened his eyes.

Hughes read the chemical test refusal admonishment to Laster, attempting to rouse him at several points as he did so. Laster's eyes were closed at first; then he appeared to be coherent and awake; and then he closed his eyes again. Hughes again asked Laster if he would take the blood test; Laster did not reply. Within a few minutes, Laster stood up on his own and walked out to the patrol car by himself. Laster's speech was slow, slurred, and mumbled, but he was cooperative and calm, and required no assistance to the vehicle.

Laster was charged with driving under the influence of alcohol or drugs and driving on a license that had been suspended or revoked for driving under the influence (§ 14601.2, subd. (a).) It was alleged in the information that Laster had two vehicular manslaughter strike convictions (fmr. Pen. Code, § 192.3, subd. (a), now Pen. Code, § 192, subd. (c)) suffered in 1983; three prior convictions of driving under the influence (§ 23152, subds. (a) & (b)); and three prior convictions of driving with a suspended license (§§ 14601.2, subd. (a), 14601.1, subd. (a)). Laster pleaded nolo contendere to the charge of driving with a suspended license.

Laster's first trial ended with a deadlocked jury. In the second trial, Laster was convicted as charged. The trial court declined to strike Laster's prior strikes and sentenced him to 25 years to life in state prison. He received custody credits of 442 days for actual custody and 66 days of conduct credits. Laster appeals.

DISCUSSION

I. Breath Analysis Evidence

Laster blew into the breath testing machine for three separate test sequences. On the first two sequences, the machine reported that it had obtained an insufficient sample, meaning that Laster had not provided a sample of deep lung air that satisfied a minimum flow rate and approximate volume of 1.5 liters. On the final try, the machine reported an "instrument time out," meaning that none of the breaths was sufficient within the three-minute time frame required by the machine's protocols. The report from the testing machine was "that there was not a completed test sequence that occurred."

The breath testing machine, however, evaluates how much alcohol is present in the sample in the sample chamber every quarter of a second. "So," the criminologist testified, "even if that air does not comply with the sufficient breath sample, there is a record as to what the last reading on the sample was." The breath testing machine produced two values for Laster's blood alcohol content: 0.111 and 0.112. The criminalist testified that the individual readings were reflective of how much alcohol was in the sample chamber at its last reading, but that a full test sequence was not completed: the test was not complete in that there were not two breath samples within a test sequence, but the analysis was performed on the sample provided.

Laster contends that the introduction of this evidence constituted prejudicial error. The trial court admitted the evidence on the basis of *People v. Adams* (1976) 59 Cal.App.3d 559 (*Adams*). In *Adams*, the question facing the court was whether breath testing results were admissible when the calibration procedure required by statute had not

been strictly observed. (*Id*. at p. 561.) The *Adams* court examined breath testing machine laws across the country, noting that some states required strict compliance with operating regulations as a precondition to the admission of test results; others had not enacted mandatory regulations governing test procedures; another provided that the statutory presumption of intoxication depended upon compliance with the regulation; and another state's law provided that noncompliance with procedures went only to the weight of the evidence. (*Id*. at pp. 563-564.) Still other states had enacted laws like California's, which do not expressly condition validity or admissibility of the test results on compliance with operating regulations. (*Id*. at p. 564.)

The *Adams* court found significance in the Legislature's decision not to expressly condition admissibility on rule compliance, in the general rule of evidence that all relevant evidence is admissible unless made inadmissible by statute (Evid. Code, § 351), and in the Legislature's rejection of an express limitation on admissibility of breath tests not performed in approved and licensed laboratories. (*Adams*, *supra*, 59 Cal.App.3d at p. 565.) The *Adams* court concluded that the test conduct regulations "are an expressed standard for competency of the test results; in effect, they are a simplified method of admitting the results into evidence." (*Id*. at p. 567.) But, the court noted, they are not the only way that the results may be admitted. "Were the rule to provide that the evidence of the test results would be inadmissible if the regulation were not followed there would be the incentive to turn the drunk driving case into a contest to find a technical defect in the test procedure so as to have the evidence excluded. Under the present rule, if the test procedure does not comply with the regulations, a defendant is protected, as the prosecution then must qualify the personnel involved in the test, the accuracy of the equipment used and the reliability of the method followed before the results can be admitted. In the present case, as the regulations were not followed, appellants were entitled to attempt to discredit the results by showing that noncompliance affected their validity." (*Ibid*.) Noncompliance with the regulations governing the testing, therefore, goes "merely to the weight of the evidence." (*Ibid*.)

The California Supreme Court has expressly approved the ruling and rationale of *Adams, supra*, 59 Cal.App.3d 559, and has held that "the standards of reliability described by the *Adams* foundational requirements are not coextensive with [] title 17 [of the California Code of Regulations]." (*People v. Williams* (2002) 28 Cal.4th 408, 417.) The Supreme Court has explained the *Adams* rule this way: breath analysis evidence may be admitted upon "either a showing of compliance with the title 17 regulations or independent proof of the three elements": instrument reliability, proper administration of the test, and operator competence. (*Id*. at p. 414.)

Here, while it was disputed whether the use of the readings from two separate test sequences complied with the California Code of Regulations, the evidence established that the operator was qualified to administer the test and that the machine was working properly. One breath on each attempt was satisfactory to the protocols of the machine: as the defense's forensic chemist explained, the machine "liked" the first part of each sample. The evidence also showed that even in the absence of a sample of the desired volume, the breath testing machine evaluates how much alcohol is present in the sample in the sample chamber every quarter of a second. The criminalist testified that the individual readings of 0.111 percent and 0.112 percent were reflective of how much alcohol was in the sample chamber at its last reading even though the test was not complete in the sense that two breath samples were not obtained within a test sequence. The criminologist testified that shallow breaths yield a lower breath alcohol result because the equilibrium between the blood and the breath occurs deep in the lungs. Accordingly, if an analysis done on an insufficient breath volume to approximate deep lung air is in any way inaccurate, it would produce a result that was lower than the actual reading because there was less deep lung air in the sample: the readings obtained were a "minimum representation" of the subject's blood alcohol content.

The criminalist testified that the reason for having two breath samples is for comparison; it gives scientific reasonableness that no introduction of mouth alcohol impacted the analysis. The criminalist opined that the two readings here, although they were not from the same test, could be compared to each other to determine whether they

agreed with one another without significant differences; if they did demonstrate that they agreed, the readings could be considered a valid test.

The defense expert witness, a forensic chemist, opined that the two samples needed to be from the same test record to be sure that no contamination (such as burping) had occurred. This witness testified that unless the samples were from the same test record, it was not a valid test, but also conceded that Title 17 of the California Code of Regulations does not require that the two results be from a single test; this is a matter of Sheriff's Department policy. Even the forensic chemist acknowledged that the machine had measured the alcohol content in Laster's breath. The forensic chemist acknowledged that the 0.111 reading was "the first assessment [of Laster's breath] that met the protocols of the instrument," and that the 0.112 reading was "an indication of what the instrument saw during that first half of the second attempt on the breath test." In both cases, the initial breath met the protocols of the machine. Both blood alcohol values were independently derived from the samples provided to the machine.

Even assuming that the breath analysis performed did not comply with California Code of Regulations requirements, a circumstance like that in *Adams*, *supra*, 59 Cal.App.3d 559, *Adams* stands for the proposition that such a failure is not necessarily fatal to the admissibility of the evidence, provided that the "foundational prerequisites of admissibility of testing results" are satisfied. (*Id*., at p. 561.) Based on the evidence that the machine was operational and the operator was qualified, as well as the evidence that although the sample volumes did not rise to the desired level, two breath analyses were performed and that to the extent the lesser sample impacted the analysis it would be to underestimate the subject's blood alcohol content, we cannot say that the trial court abused its discretion in concluding that the *Adams* foundational requirements of properly functioning equipment, a properly administered test, and a qualified operator were met here such that the failure to comply with the volume requirements was a matter of the weight, rather than the admissibility, of the evidence. (*Id*. at pp. 561-567.)

II. Sufficiency of the Evidence

"When a jury's verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the jury." (*People v. Brown* (1984) 150 Cal.App.3d 968, 970.) We review the record in the light most favorable to the judgment and determine whether it discloses substantial evidence such that a rational trier of fact could find Laster guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We conclude that the evidence is sufficient to sustain Laster's conviction.

Laster drove his car in a dangerous and erratic manner. He was driving up to 95 miles per hour, weaving and swerving, and he approached cars ahead of him so quickly that he had to slow abruptly to avoid hitting them. All this conduct gives rise to an inference that Laster had a deficient perception of speed and/or distance. He initially failed to yield to attempts to stop him. He smelled of alcohol. He had red, watery eyes, and slurred and slow speech. Four field sobriety tests suggested that he was under the influence. Even leaving aside the evidence from the breath analysis machine, the evidence was sufficient to support Laster's conviction for driving under the influence of alcohol.[2]

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[2] We also note that in the opening brief "counsel ma[de] no attempt to comply with the cardinal rule of appellate practice that all of the evidence, both favorable and unfavorable, must be presented in appellant's brief so that the court may determine whether there is any substantial evidence to support the finding of guilt [citation]. The rule extends to criminal as well as civil cases [citation]. The reason for counsel's casual treatment of the record is not far to seek, for the court of review must accept as true the substantial evidence favorable to respondent [citation]." (*People v. Jones* (1963) 215 Cal.App.2d 341, 343.)

III. CALCRIM No. 2130

The jury was instructed with CALCRIM No. 2130, which permits the jury to conclude that a defendant is conscious of his guilt of driving under the influence if he refuses to submit to a chemical test, but also reminds the jury that it is up to the jury to determine the meaning and importance of the refusal. Laster argues that the instruction should not have been given because he consented to the breath test, and therefore his apparent refusal to take the blood test could not be used as demonstrating consciousness of guilt. The court must instruct on every theory of the case that is supported by substantial evidence, but it is error to instruct on a theory of guilt without evidentiary support. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290.)

Laster consented to the breath analysis test but proved unable to perform on the breath analysis machine in compliance with the machine's protocols. Upon viewing the messages generated by the breath testing machine, the officer concluded that Laster had been unable to perform that test and asked him to undergo a blood test. (§ 23612, subd. (a)(2)(A) [if a person arrested for driving under the influence of alcohol is incapable of completing the chosen test, the person shall submit to the remaining test].)

When a defendant selects one chemical test but is unable to complete it, his or her refusal to submit to an alternative test constitutes a refusal. (*Kessler v. Dept. of Motor Vehicles* (1992) 9 Cal.App.4th 1134, 1139; *Cahall v. Dept. of Motor Vehicles* (1971) 16 Cal.App.3d 491, 496.) The trial court properly determined that the evidence supported the instruction: the evidence of Laster's conduct would certainly permit the jury to conclude that Laster refused the blood test. At the hospital, Laster answered booking questions as he and the officer waited for a nurse to take his blood. When the nurse came, however, Laster's eyes were closed. Hughes had no difficulty getting him to open his eyes, but Laster closed his eyes again, did not give consent for the blood draw, and acted as if he were sleeping. Hughes then read Laster the chemical test refusal admonishment as required by law. Laster kept his eyes closed at first, and then opened them when Hughes instructed him to listen to what he was reading. Laster appeared

coherent and awake, but closed his eyes partway through the admonishment. Laster answered when asked if he was listening, but did not respond when asked to submit to the blood test. When the officer gave up and took Laster out of the hospital, he walked out on his own, awake.

This evidence supports giving CALCRIM No. 2130, for a jury could have easily concluded from the evidence presented that Laster had refused the blood test. Accordingly, Laster's argument that the instruction was invalid and violated federal due process fails because the jury could easily have drawn the permissive inference authorized by the jury instruction.

Laster argues, however, that it was error to permit the introduction of the breath analysis evidence—which shows that he performed the first test well enough to generate results that were used to establish his blood alcohol content in court—and also to instruct the jury concerning inferences that could be drawn from his refusal of a second test. While we acknowledge that the evidence from the breath test ultimately was admitted despite the irregularities in its collection, the refusal instruction did not prejudice Laster. CALCRIM No. 2130 permitted the jury to conclude from Laster's refusal of the blood test that he was aware that he was driving under the influence, and it also instructed the jury that it was to decide the meaning and importance of the refusal. But Laster's conviction rested on abundant evidence that he was driving under the influence of alcohol: his erratic driving, his performance on the field sobriety tests, the strong smell of alcohol emanating from him, his appearance and behavior as observed by Hughes, and the results of the breath analysis machine. All this evidence clearly established that Laster was driving under the influence without any need to resort to an inference of consciousness of guilt. Because of the overwhelming evidence to support the conviction, any error in giving CALCRIM No. 2130 in light of the introduction of the breath analysis machine results was harmless. (*People v. Watson* (1956) 46 Cal.2d 818.)

IV. Prior Strikes

Laster argues that his prior convictions for vehicular manslaughter cannot be considered strikes for purposes of the Three Strikes Law. The Three Strikes Law, however, specifically incorporates the definition of "serious felony" in Penal Code section 1192.7, subdivision (c) for the purposes of enhanced sentencing under the Three Strikes Law. (Pen. Code, §§ 667, subd. (d)(1); 1170.12, subd. (b)(1).) Penal Code section 1192.7, subdivision (c)(8) defines as a serious felony "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice." Laster has not argued that he did not personally inflict the great bodily injury here; because felony vehicular manslaughter by definition only occurs when the victim has died, it constitutes a serious felony under Penal Code section 1192.7, subdivision (c). (*People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1691, called into doubt on other grounds by *People v. Reed* (1996) 13 Cal.4th 217, 229; see also *People v. Brown* (1988) 201 Cal.App.3d 1296, 1298, 1300-1304 [while not specified as a serious felony, involuntary manslaughter may fall within Penal Code section 667 if the defendant personally inflicted great bodily injury in the course of the crime]; *People v. Equarte* (1986) 42 Cal.3d 456 [assault with deadly weapon can fall under Penal Code section 667 if the prosecution establishes that the defendant personally used a dangerous or deadly weapon, as listed in Penal Code section 1192.7, subd. (c)(23).) *People v. Cook* (1984) 158 Cal.App.3d 948, on which Laster relies to argue the contrary, was disapproved in *Gonzales*, at pages 1691 and 1692, and rejected in *Brown*, at pages 1300-1304 and footnote 6.

V. *Romero* Motion

Laster asserts that the trial court abused its discretion when it denied his motion to strike his prior convictions under Penal Code section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 for the purposes of applying the Three Strikes Law.

"[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) We review rulings on motions to strike prior convictions for an abuse of discretion. (*Id.* at p. 162.)

Laster argues that one or both of his prior strikes should have been stricken because: he produced evidence at sentencing that he was on prescription medications that could have caused his conduct; this offense was "minor and non-aggravated"; as both manslaughter convictions arose from a single collision, one must be stricken; the court failed to consider his background, character, and prospects; and Laster is outside the spirit of the Three Strikes Law. None of these arguments establishes an abuse of discretion. Laster's serious depression and medication use do not alter the fact, found by the jury and supported by substantial evidence, that he was driving under the influence of alcohol, nor do they decrease the severity of the crime. That this time Laster did not injure anyone, or cause property damage, does not diminish the extreme danger posed by Laster's conduct; and the court quite reasonably did not consider the offense to be minor, as Laster describes it. Neither *People v. Benson* (1998) 18 Cal.4th 24 nor *People v. Sanchez* (2001) 24 Cal.4th 983, disapproved on another point in *People v. Reed* (2006) 38 Cal.4th 1224, compelled the court to exercise its discretion to strike one of the two vehicular manslaughter strikes because they both arose from the same collision, for both of those cases concerned multiple convictions arising from an act impacting a single victim, where punishment for both offenses would violate Penal Code section 654—not the circumstance here, where Laster killed two victims with a single act.

Finally, we have reviewed the transcript of the hearing on the *Romero* motion and conclude that, contrary to Laster's contention, it is apparent that trial court fully discharged its duty to consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, Laster should have been deemed outside the scheme's spirit, in whole or in part. (*Williams*, *supra*, 17 Cal.4th at p. 161.) The court began with its tentative ruling: "There would be two things that would jump out to this court in considering this motion: One would be the fact that it was one act that led to both strikes, though clearly they are legally sufficient to be the two strikes, then the passage of 22-some years, 23 years between his conviction and this act.

"But what I see is a man that in 1976 had a DUI. We all make a mistake in life. He then has in essence another DUI in 1983 that tragically kills two people. If there would be one thing that would scare someone straight, it would have to be that. If there was then a pristine record, I'd be struggling with this motion. But what we have then—and I'm simply looking at the probation report—is a possession of firearm in '95, possession of narcotics in '97, and not only is there a conviction for possession of narcotics, but yet another three years state prison, another state prison which was three years, and then a continuing conduct of driving unlicensed starting in 1999, theft in '04, and then a [section] 14601.2[, subdivision] (a); so that deals obviously with not only driving with suspended license, but related to the issues of the DUI, and then in December of '06, the DUI.

"The court's further troubled by the conduct that was testified to in this incident. I've used this phrase before. I don't know if it's a really appropriate phrase, but if I'm intellectually honest in dealing with the *Romero* motion, I don't have, if you will, the extraordinary circumstances that take[] this case away from the law. The burden legally is with the defendant to show that there is, to me, ultimately unfair justice if I allow the Three Strike[s] Law to prevail. There is nothing here that really shakes me, other than the age of the strikes. But it's just constant—not only constant issues, but a flagrant defiance of our laws relating to driving under the influence, which unfortunately and

scarily kills so many people day in and day out. This defendant killed people because of DUI."

The trial court heard counsel's argument and the statements of two of Laster's family members, and then responded, "Given that two people gave heart-felt presentations to the court, I want to acknowledge that I heard you. Please don't think that by my ruling that I'm ignoring what you said. I respect everything you said, and I—my heart heard you, but my job is not only to let my heart dictate what has to happen. There can be many, many victims to the various crimes that were committed by Mr. Laster, and I unfortunately see you as victims as well. I thank you so much for your presentations." The court then denied the motion, stating, "The court has amply laid out the reasons why there have been too many victims already for Mr. Laster's conduct and cannot afford to have any[ ]more."

Although the court had made a comment before the family members spoke that it did not believe their remarks to be relevant to the *Romero* motion, the court's subsequent statements demonstrate that the court did consider them in making its ruling on the motion. The court's extensive comments demonstrate that it had thoroughly considered the nature and circumstances of Laster's present felony and his prior serious and/or violent felony convictions, as well as the circumstances of his background, character, and prospects, and the court concluded that in light of his specific criminal background and numerous convictions that related to driving under the influence, Laster could not be considered to be outside the scheme's spirit, in whole or in part, such that sentencing him as a third strike offender would be unjust. (*Williams*, *supra*, 17 Cal.4th at p. 161.) There was no abuse of discretion here.

VI. CALCRIM No. 2130A

Laster argues that CALCRIM No. 2130A, which provided the jury with the text of California Code of Regulations, title 17, section 1219.3, concerning breath samples for a breath analysis machine, was inadequate because it contained the word "alveolar," which

he contends is a word with a technical legal meaning that should have been defined for the jury. The trial court has a sua sponte duty to give an amplifying or clarifying instruction to the jury when terms used in an instruction are ambiguous, have a particular and restricted meaning, or have a technical meaning peculiar to the law. (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) Although the phrase "deep lung" was generally used during trial rather than the synonymous term "alveolar," "alveolar" was defined as meaning a "deep lung breath" by People's Exhibit 7, and that exhibit also explained that alveoli are sacs in the lungs where the exchange of oxygen and carbon dioxide gases between the blood and the breath take place. Laster attempts to minimize this evidence by arguing that it was buried on the fifty-first page of a "voluminous" exhibit, but Exhibit 7 was actually a one-page exhibit that consisted of page 51 of the Sheriff's Department Blood Alcohol Manual. Moreover, defense counsel specifically referred to this one-page exhibit during closing argument. It does not appear, and Laster has not shown, that this medical term lacks a plain and unambiguous meaning or has a restricted or technical meaning particular to the law that the court had any obligation to define. There was no error here.

VII. Custody Credits

As noted by both Laster and the Attorney General, the trial court erroneously limited Laster's presentence custody credits to 15%. When a third strike offense is not a violent felony within the meaning of Penal Code section 667.5, subdivision (c), as here, the defendant is entitled to presentence conduct credits calculated under Penal Code section 4019. (*People v. Thomas* (1999) 21 Cal.4th 1122, 1130.) To calculate Laster's presentence custody credits, his actual presentence custody time of 442 days is divided by four and rounded down to the nearest whole number—110 days—and then multiplied by two, for a total of 220 days of custody credit. (Pen. Code, § 4019; *People v. King* (1992) 3 Cal.App.4th 882, 884-885.) Laster is entitled to 662 days of presentence custody credits.

DISPOSITION

The judgment is modified to reflect 442 days of actual custody credits in addition to presentence credits in the amount of 220 days, for a total of 662 days of presentence custody credits. The clerk of the superior court is ordered to prepare an amended abstract of judgment as set forth in this opinion and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.